

No. 2528.

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*In the*  
**United States Circuit Court of Appeals**  
*For the Ninth Circuit.*

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JOHN A. JESSON, E. R. PEOPLES, JAMES W. HILL,  
RAY BRUMBAUGH, R. C. WOOD and JOHN L.  
McGINN, - - - - - *Appellants,*

VERSUS

F. G. NOYES, as Receiver of the WASHINGTON-  
ALASKA BANK, a Corporation, - - *Appellee.*

---

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

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**B R I E F     O F     A P P E L L E E .**

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O. L. RIDER,  
*Attorney for Appellee.*

**Filed**

MAY 23 1917

**F. D. Monckton,**  
Clerk.



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*For the Ninth Circuit.*

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---

**B R I E F   *of*   A P P E L L E E .**

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**Statement.**

This is a suit by the Receiver of an insolvent bank against its former officers and directors to enforce an alleged liability for their wrongful, unlawful, fraudulent and negligent acts and conduct in managing the affairs of plaintiff bank, whereby the

bank was injured and its assets wasted or diverted so that it is unable to pay its creditors in full. A number of such acts are particularized, but the court found against plaintiff as to all of them except the declaring and paying of a dividend on April 10, 1910, and certain purchases of its capital stock for the bank. As to these, it entered judgment in favor of plaintiff, and with them only this appeal is concerned.

Appellants do not bring the entire decree here for review, but only such portions thereof as are unfavorable to them. Neither do they bring up the entire record in the case, but only such portions thereof as pertain to the portions of the decree appealed from. (Order allowing and settling Defendants' Bill of Exceptions, Rec., p. 1120.) The force of the evidence and the entire survey of the matters in controversy cannot, therefore, be presented to this court in the same full and comprehensive manner that they were to the lower court. For instance: One of the charges of the complaint was that the directors paid the partnership, to which the corporation bank was successor, too much for the capital stock of Gold Bar Lumber Company. The lower court found that the evidence was not sufficient to sustain plaintiff on this item. It therefore passes out of this appeal and the evidence bearing upon the same is not included in the above order allowing and settling the Bill of Exceptions. Nevertheless, appellants devote eight pages of their brief (pp. 123-130) to a discussion of the proposition that "The Directors were entitled to take Gold Bar

stock at its book value." All consideration of such evidence in the Bill of Exceptions as bears upon the value of Gold Bar stock should be eliminated, because it is not certified to be full and complete, and, in so far as the facts touching upon the value of Gold Bar stock concern this appeal, such consideration should be limited to those facts found by the court.

Counsel for appellants seem to have considered this case as a creditors' bill, and hence only rights existing strictly in favor of creditors against officers and directors of a corporation can be enforced. In this they have misconceived the nature of the suit. It is a suit brought by a Receiver of an insolvent bank against such officers and directors, not to enforce the limited rights of creditors in the limited way such rights are enforced, but to enforce the *claims of the bank* against its faithless officers and directors for the injury done the *bank*. True, such a suit redounds to the benefit of creditors, but it is the *bank's claim* which is being enforced as an asset in the hands of the Receiver. This proper conception of the suit will clear away many of the difficulties suggested by counsel to maintaining it.

I know that the relation of the officers and directors to the creditors of a corporation has been a fruitful source of controversy and dissension in the courts and among lawyers generally; but the relation between the officers and directors and the *corporation* is easy of solution. They are its agents and in respect to the care and management of its property they occupy the relation that all agents bear to their

principal—one of trust. As to the property of the corporation, they are *quasi trustees*, and for a breach of the duties arising out of that relation, the corporation has its claim for damages. Upon insolvency, this claim becomes an equitable asset in the hands of its Receiver, and may be enforced and collected as all others may be. The claim of the creditors to it attaches just as to all other assets. They are seeking through the Receiver what they have a right to have—the assets of the bank. To this end the complaint seeks an accounting, a collecting in and marshalling of all the assets of the bank, and a fair and equitable distribution thereof among the creditors. These defendants, by the acts complained of, wasted the assets of the bank, diverted them to improper and unlawful purposes, in some instances converted them to their own use, and now they are called to account just as any other *quasi* trustee would be. As to the fruits of their misdeeds now in their hands, they must disgorge. As to such property as they misappropriated or diverted to improper purposes, they must respond in damages. Such action as the part of the Receiver to collect in the bank's assets is sometimes called "following trust funds" and at other times "enforcing a trust." By whatever term it is designated, the result is the enforcement of the bank's right to have its property restored for the benefit of its creditors.

In support of these principles see the authorities cited under sub-division I *infra*.

## ARGUMENT.

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As above stated, the respective claims and defenses as to but two matters which go to the merits are before the court on this appeal, namely, the declaring and paying of the dividend, and the purchases of certain shares of stock. In addition to these are two questions of pleading, namely, Is the complaint multifarious? and, Is it insufficient because of failure to plead the corporate law of Nevada? I shall consider these matters under the following sub-heads:

1. The complaint is not multifarious, because it presents but one cause of action.
2. Failure specifically to plead the corporation law of Nevada has been waived.
3. The defendants Wood, McGinn, Brumbaugh, and Jesson are liable jointly and severally for declaring and paying the dividend as found by the decree.
4. The defendants Jesson, Hill, Peoples, Brumbaugh, and McGinn are liable jointly and severally for the purchases of shares of capital stock made during their respective terms of office as found by the decree.

5. Plaintiff is not limited to a recovery for the benefit only of creditors existing at the times of the acts complained of and whose claims remain unpaid. He may recover to such extent as the bank has been injured.
6. The Barnette trust deeds were not an accord and satisfaction of plaintiff's claims against defendants either in whole or *pro tanto*.

## I.

### **The Complaint Is Not Multifarious, Because It Presents But One Cause of Action.**

The complaint presents but one cause of action—the recovery of the bank's funds which have been diverted by the bank's trustees. It makes no difference that all the diversion did not occur at one time or through the acts and conduct of one particular group of defendants. The defendants, during the respective terms of their office, were its directors charged with the duties of *quasi trustees* in the management and control of its property as an entirety. That trust as to it was at all times impressed upon that property. All of it, or any part of it, while under their control, or while under the control of any one or any group of them, was trust property of the bank. If any one of them, or any group of them acting together, wasted it, or converted it, or misapplied or diverted it, to that extent such one or ones breached that trust. While the different breaches may have

been separate and distinct one from the other, nevertheless each and all operated upon the single trust fund, depleted it here and there, and broke it into fragments of which each took his respective part at the respective times. But as to them and each of them it was none the less trust property even though separated from the general mass. Such of it as was converted to their own use was received by them impressed with the trust, *cum onere*, for they knew it was property of the bank, and it is still so held by them and can be followed and reclaimed as against any holder who did not receive it *bona fide*. If they diverted it to the use of another, they did so knowing it was trust property of the bank and must respond to the bank or its representative for the value thereof. The Receiver by following this property and enforcing this trust presents a single issue, a common point of litigation in which all these defendants are interested. The fact that the channels along which this trust property flowed out of the bank's control are numerous, and devious, and not of the same magnitude or origin is beside the question. A court of equity, through its Receiver, can reach out into the various channels, and enforce the trust. It is this trust relation on the part of the directors toward the corporate property that fastens each of them to the common center, their duty as *quasi trustees*. The bank while solvent could enforce this claim against its directors for the injury it sustained due to their wrongful acts. Failing to do so, the claim upon insolvency becomes an asset in the hands of its Receiver and may

be enforced by him for the benefit of those entitled to have the bank's assets.

—Pomeroy Eq. Jur. (3rd ed.), Secs. 1090, 1047;

Zane on Banks & Banking, Secs. 81, 86;

*Devlin v. Moore*, (Or.) 13 Pac. 35, 40;

*Brown v. Schleier*, 55 C. C. A. 474, 480-1, 118 Fed. 981;

*Sargent v. Am. B. & T. Co.*, (Or.) 154 Pac. 759, 763, 766;

*Clark v. Bank*, (W. Va.) 78 S. E. 785, 786;

*Benedum v. Bank*, (W. Va.) 78 S. E. 656;

*McTamany v. Day*, (Idaho) 128 Pac. 563, 565;

*Coddington v. Canaday*, (Ind.) 61 N. E. 567;

*Bailey v. Mosher*, 11 C. C. A. 304;

*Yates v. Jones Nat. B'nk*, (Neb.) 105 N. W. 287;

*Cockrill v. Abeles*, 30 C. C. A. 223.

I am not contending for the principle that corporate assets are trust funds in the full sense of that term. It is not necessary here to do so, although there is very respectable authority to support it. These authorities are cited and reviewed at length in companion cases to this appeal now pending in this court to which reference is respectfully made, namely, *Noyes v. Wood et al.*, No. 2593, and *Noyes v. Wood*, No. 2594. But I do contend that when a Receiver of an insolvent bank institutes a suit against its officers and directors for misappropriation of its corporate

property that suit presents but a single cause of action, involves a common point of litigation, so that it is not multifarious even though the particular acts complained of occurred at different times and each act was not common to all. For this reason the statute of Alaska respecting joinder of causes of several causes of action (Sec. 1201), cited by counsel for appellants, has no application.

Counsel cites and relies upon but one case to support his contention that several causes of action are improperly united, that of *Emerson v. Gaither*, 103 Md. 504. It is a strong case, but it is contrary to the authorities and is not supported by reason, as will be subsequently shown.

Alluding again to the section of the Alaska Code above referred to, I am unwilling to concede that it has any application whatever to the matter under consideration. The Supreme Court of the United States has promulgated rules regulating equity procedure in United States Court which in all probability supercede said section entirely. If they do not, the decisions of the federal courts are controlling in this case in determining what is multifariousness. Those decisions as well as those of many state courts hold that a complaint like the one herein presents but one cause of action.

—*Heckman v. U. S.*, 224 U. S. 413, 56 L. ed. 820, 834;

*Mullen v. U. S.*, 224 U. S. 448, 56 L. ed. 834;

- Graves v. Ashburn*, 215 U. S. 331, 54 L. ed. 217, 221;  
*U. S. v. Am. Bell Tel. Co.*, 128 U. S. 315, 32 L. ed. 450, 456;  
*Brown v. Safe Deposit Co.*, 128 U. S. 403, 412;  
*Harrison v. Perea*, 168 U. S. 311, 42 L. ed. 478, 481;  
*Heyden v. Thompson*, 71 Fed. 60, 17 C. C. A. 592;  
*Kelley v. Boettcher*, 85 Fed. 55, 29 C. C. A. 14, 23;  
*Curran v. Campian*, 85 Fed. 67, 29 C. C. A. 26;  
*Cockrill v. Cooper*, 86 Fed. 7, 29 C. C. A. 529;  
*Wyman v. Bowman*, 127 Fed. 257, 62 C. C. A. 189;  
*Boyd v. Schneider*, 131 Fed. 223, 65 C. C. A. 209;  
*U. S. v. Allen*, 179 Fed. 13, 103 C. C. A. 1 (Affd. 224 U. S. 413);  
*Benson v. Keller*, (Or.) 60 Pac. 218.

In *United States v. Allen*, *supra*, which was affirmed in *Heckman v. U. S.*, *supra*, the bill, for the reason that it presented a question of common interest to all defendants, was held not to be multifarious. It was one of 301 bills brought by the United States in equity against 16,000 defendants to cancel some 30,000 conveyances. The parties to each conveyance were separate and distinct. The land affected was different. The conveyances consisted of

deeds, mortgages, bills of sale, powers of attorney and almost every conceivable kind of instrument by which rights in real estate could be transferred. The Supreme Court rested its decision upon avoidance of unnecessary suits presenting the same question for determination.

In *Brown v. Safe Deposit Co.*, *supra*, the Supreme Court said:

“ It is not indispensable that all the parties should have an interest in all the matters contained in the suit. It will be sufficient if each party has an interest in some material matters in the suit, and they are connected with the others.”

*Hayden v. Thompson*, *supra*, and *Cockrill v. Cooper*, *supra*, are cases identical with the one at bar, and the claim of multifariousness was not allowed.

I am informed that the Alaska Code of Civil Procedure was based upon that of Oregon. If that be so, then the decision of the Oregon court above referred to is very pertinent. That court caught the point of a common point of litigation and held that a suit to cancel due-bills *fraudulently* obtained from plaintiff was not multifarious even though various defendants were joined who had an interest in each other's connection therewith, but were each affected by the establishment of plaintiff's claim of fraud in obtaining them from him, though not all parties thereto.

It is respectfully submitted that the complaint is not multifarious and that there was no error in overruling the demurrer on that point.

## II.

### **Failure Specifically to Plead the Corporation Law of Nevada Has Been Waived.**

Appellants are now contending that the failure to plead the corporation law of Nevada making it unlawful to purchase the stock, or declare the dividend, renders the complaint fatally defective. This point was never raised before. It was not argued to the lower court, and it is not embodied in the Bill of Exceptions.

The complaint charges as to the matter of the dividend (Par. 27, Rec. 31-32) that on April 12, 1910, when the same was declared, the bank "was, and a long time prior thereto had been, in a grossly insolvent and failing condition;" that it had on hand, after applying the dividend of \$25,000.00 that day received on its stock in the Washington-Alaska Bank of Washington, "in apparent surplus, undivided profits and earnings the sum of \$32,749.82, while the dividend declared and paid amounted to \$33,720.00;" that it "had in fact on said date no earnings, surplus or undivided profits on hand out of which said dividend could be *legally* paid, but on the contrary had at and prior to said date neither capital nor surplus," and then lists items aggregating \$287,131.58 as to

which it is alleged its apparent assets should be reduced: that said dividend was “wrongfully, unlawfully and fraudulently declared and paid \* \* \* with the express knowledge, consent and approval of the defendants \* \* \* out of, by and with the funds and money of the depositors of said Fairbanks Banking Company, a corporation, and not by, out of or with the surplus, earnings, undivided profits of said Fairbanks Banking Company;” and that on said date said bank “owed to depositors the sum of \$960,689.79.”

As to said stock surrenders, it is alleged (Par. 19, Rec., pp. 19-22) that “shortly after said corporation, the Fairbanks Banking Company, commenced business, said corporation wrongfully and *unlawfully* began to reduce its issued capital stock by accepting the surrender thereof and paying therefor either cash or the stock subscription notes given for said stock,” a list of which stock so surrendered, giving the amount, date of surrender, number of shares and name of stockholder, is then set out; that during all the time within which said stock surrender took place “the liabilities of said corporation to its general creditors, greatly exceeded its assets, and by accepting the surrender of its capital stock and returning therefor cash or subscription notes, as aforesaid, the assets of said corporation, to which said creditors could look for payment of their claims, were further decreased, and the same were, in the manner and amounts aforesaid, withdrawn and divided among said stockholders;” that said surrender and the re-

turn of said cash and notes as above set forth “were made to and by said corporation with the full knowledge, consent and approval of the defendants and each of them who constituted its directors and officers on the dates aforesaid, or by the exercise of ordinary care the same could have been known to them and each of them,” and then follows a list of the officers and directors and the dates of their terms of office.

It is then charged (Par. 37, Rec., p. 40) that the assets of the bank “were, and still are, by reason of the wrongful, fraudulent, and negligent acts and conduct of the defendants herein alleged, insufficient in amount to pay the debts and liabilities thereof in full” and by more than Four Hundred Thousand Dollars.

It is then charged (Par. 38; Rec., pp. 40-41) that “The said wrongful, *unlawful* and fraudulent and negligent acts and conduct of the defendants, while officers and directors \* \* \* as aforesaid, are and were the sole and proximate causes of said assets of said Washington-Alaska Bank being as insufficient, as aforesaid, to pay its liabilities in full, and by reason of said wrongful, *unlawful* and fraudulent and negligent acts and conduct of said defendants, while directors and officers of said Washington-Alaska Bank (formerly Fairbanks Banking Company) *said Washington-Alaska Bank suffered loss and damage* in excess of the sum of Four Hundred Thousand Dollars.”

Reverting now to the claim that the allegations of the complaint are not sufficient to charge a statutory liability under the Nevada corporation law because said law is not specifically pleaded, we find that it is charged that said dividend was not declared and paid out of, nor said stock purchases made with, the surplus, undivided profits or earnings of the bank, but out of and with the capital and money of its depositors, and that, in addition to being wrongful and fraudulent, such acts and conduct were “unlawful,” and could not be “legally” done. It is not contended that the allegations are not sufficient to sustain a common law recovery and with that question we are not now concerned. The demurrers are general and suggested no insufficiency because of failure to show that the unlawfulness or illegality of the acts complained of lay in failure to plead the Nevada law, and no such suggestion was made to the lower court. If defendants wanted to know wherein such charge of unlawfulness or illegality lay they could have found out by a motion to make more definite and certain. Failing so to move or call the matter to the attention of the lower court, they have waived the point, if it has any force at all.

Moreover, said laws were received in evidence without the slightest objection by defendants (Rec., pp. 391-2). They themselves relied upon parts of them *without pleading them, and offered them in evidence* (Rec., p. . . .). No exception whatever was taken or saved to their receipt in evidence or to their

consideration as applicable to defendants' liability. The trial proceeded on the theory that they were applicable. It comes too late now after a long, expensive trial has been had, and after three years have elapsed, for counsel who were not present at the trial to complain for the first time of this matter. The defendants were not prejudiced in the least by this failure to plead these laws. Their conduct at the trial shows that. In addition to their failure to object or except thereto, and in addition to the fact that they themselves introduced parts of these laws in evidence without pleading them and relied on them as a defense, is the further fact that the defendants knew from the first stages of the organization of the bank that the laws of Nevada would govern them and determine their liability. The original subscription for stock, copied in Par. 3 of the complaint (Rec., p. 4) recites the contemplated organization of a bank "under the laws of the State of Nevada." The testimony of Mr. McGinn, the bank's attorney at the time of the organization and for a long time afterwards, and one of the defendants herein and leading counsel at the trial, when testifying at the trial shows that consideration of the Nevada laws and their applicability were not new matter. He says (Rec., pp. 920-921) :

" A. Yes, sir. I had Frost on Corporations. When I looked up where they have the statutes where it is prohibited that they shall buy any stock, and there was no law on that subject, *no prohibition against it in the law of Nevada*, according to Frost. I still have that work."

It is provided by the Alaska Code of Civil Procedure, Sec. 929, as follows:

“The court shall, in every stage of an action, disregard any error or defect in pleading or proceedings which shall not affect the substantial rights of the adverse party.”

It is respectfully submitted that no prejudice has resulted to defendants by reason of the failure to specifically plead the corporation law of Nevada.

### III.

**The Defendants Wood, McGinnis, Trumbaugh and Jesson  
Are Liable Jointly and Severally for Declaring and  
Paying the Dividend as Found by the Decree.**

The findings of fact, as to declaring and paying said dividend are contained in Findings 60, 61, 62 and 63 (Rec., p. 214), and they are as follows:

#### “LX.

“ That on the 12 day of April, 1910, the said Fairbanks Banking Company, by its board of directors, declared a dividend of twenty per cent on its then outstanding capital stock of \$168,600, which dividend amounted to \$33,720.00, and which said sum was paid to the stockholders of said bank either in cash or by crediting the amount thereof upon notes owing by said stockholders to said bank.”

#### “LXI.

“ That at the time said dividend was so declared and paid, the said Fairbanks Banking

Company did not have any surplus or undivided profits out of which the same could be declared and paid.”

“LXII.

“ That said dividend was declared and paid in violation of the laws of the State of Nevada, and also in violation of the by-laws of the said Fairbanks Banking Company, and was wrongful and illegal.”

“LXIII.

“ That at the time said dividend was declared and paid, the defendants Wood, McGinn, Brumbaugh and John A. Jesson, were members of the board of directors of the said Fairbanks Banking Company, and gave their consent thereto.”

These findings having been made upon conflicting evidence are conclusive on appeal, unless a serious and important mistake has been made.

—*Shields v. Mongallon Expl. Co.*, 70 C. C. A. 123.

That the dividend was declared and paid as found in Finding 60, there is no dispute, nor is there dispute as to Finding 63. It remains to examine the record sufficient to ascertain if there is evidence on which to base Findings 61 and 62. If there is, then they must be accepted as facts and the law properly applied to them. They will be considered in their order. (a) Did the bank at the time the dividend was declared and paid have surplus or undivided profits out of which the same could be declared and paid?

(b) Was the dividend paid in violation of the laws of Nevada, and in violation of the by-laws of the bank, and was such declaration and payment wrongful and illegal?

(A) As shown by the books of the bank, according to the testimony of Sidney Stewart (R., p. 386), the Fairbanks Banking Company had on that day as undivided profits \$7,749.82 to which was added \$25,000.00 of the dividend received from the Washington-Alaska Bank of Washington, making a total undivided profits of \$32,749.82. The dividend declared amounted to \$33,720.00 or \$970.18 in excess of the total undivided profits if all the assets of the bank were worth their book value. On that day (Rec., p. 386) the bank was carrying as assets the following: Gold Bar Lumber Company stock \$341,949.00; Washington-Alaska Bank of Washington stock \$250,000.00; paper then past due and still unpaid \$111,243.51.

As to Washington-Alaska Bank stock, it is only necessary to refer to the cross examination of the defendant Wood to find testimony sufficient to destroy all his testimony previously given on behalf of himself and his co-defendants that it was worth \$250,000.00 and depreciate it at least \$75,000.00. This witness perhaps had more intimate and competent knowledge on that subject than any other one that could be found. He was a banker of years of experience at Fairbanks, a member of the partnership of Fairbanks Banking Company to which the corpora-

tion plaintiff succeeded. After the incorporation, he was its cashier until June, 1908. In the early fall of 1909, at the time when the Fairbanks Banking Company, the Washington-Alaska Bank of Washington and the First National Bank pooled their interests, and Fairbanks Banking Company purchased this Washington-Alaska Bank stock, he became cashier of the latter bank and manager of the three institutions. This latter position he held until some time in May, 1910, and at the time the dividend was declared. He prepared a record of the notes and securities, loans and discounts of the Fairbanks Banking Company and said Washington-Alaska Bank showing all the information he could obtain concerning the same. He required the cashiers of these two banks to submit him reports of their affairs, and would meet with them after banking hours and go over the affairs of the two institutions with them. Thus he became thoroughly familiar with the affairs of both the Washington-Alaska Bank and its sole stockholder the Fairbanks Banking Company. Substance testimony of R. C. Wood. (Rec., pp. 654-664.)

Now this witness prior to the trial herein, on the trial of certain criminal cases against Barnette, had at Valdez, Alaska, in December, 1912, was examined as a witness respecting several of the matters in controversy in this action, among them the worth of the Washington-Alaska Bank stock. His cross examination respecting the matter is found at pages 747-751 of the record herein, a portion of which is as follows:

“ Q. Now, you said something about the value of that stock. I don't think I got your answer. A. On April 12th?

Q. Yes, if that was the time you were testifying about?

A. I said I considered that the directors thought that the value of the Washington-Alaska Bank stock was about \$225,000.

Q. More than one of the directors?

A. Yes, sir.

Q. What did you consider it worth?

A. Well, I considered it the same as the other directors.

Q. You considered it worth \$225,000?

A. Yes, sir.

Q. On April 12, 1910? A. Yes, sir.

Q. What did you consider it worth on December 31, 1909?

A. Well, I thought it was worth \$250,000.

Q. What do you think it was worth in September, 1909, when they bought it?

A. Well, I think it was worth that amount.

Q. You think it was worth \$250,000?

A. Yes, sir, and I think other men will say the same thing.

Q. Your testimony respecting that matter was given by you in the Barnette cases, was it not?

A. I testified that I t h o u g h t they paid \$75,000 too much for it.

Q. When you gave your testimony at Valdez you testified that you thought they paid \$75,000 more than it was worth, didn't you?

A. I don't remember about that.

Q. Let us see. Let me read the questions and answers. This is a question on direct examination by Mr. Crossley (reads): 'Q. You knew what had been paid for the Washington-Alaska Bank? A. I did. Q. As a conservative banker, would you have paid \$250,000 for it? A. I certainly would not.' You gave that testimony, did you not?

A. I don't remember that.

Q. There were some objections and interruptions following that, and then continuing (reads): 'Q. It was purchased in September, 1909. What was its value then? What was it worth then? A. That is a pretty hard question to answer. If you take the actual book value of the bank, and give nothing for its good will, the value of that bank at that time—and charge off its bad debts—would have been, I think, about to the best of my recollection, not over \$175,000. I doubt whether it would have brought that much if it had been liquidated at that time. Q. In other words, they paid \$75,000 more than it was worth, in your opinion? A. That has always been the way I felt about it.'"

As shown by the testimony of Mr. Stewart, above referred to, there was carried on said date, as a part of the assets of the bank, \$111,243.51 of paper, which was then past due and is still unpaid. Some of this paper had been past due two or three years at that time. Mr. Wood was a banker of experience and a good collector of paper. There can be no reasonable doubt but that he used every effort possible to collect in the amount due on this paper, and if it could have

been collected, he would have done so. He was examined and cross examined upon this subject, and his cross examination is found at pp. 753-768 of the record, and no reasonable inference can be drawn from it but that many thousands of dollars worth of this paper was utterly worthless and uncollectable. Some of it had been previously charged off by the bank, an attempt had been made to collect some of it by suit, and in one instance at least, the maker of the paper was a bankrupt. Of this paper, \$69,908.94 is paper that was received from the partnership in March, 1908, and is still in the hands of the receiver, unpaid and uncollectable. This paper was past due from six months to two years at the time the bank took it over from the partnership. Mr. Wood was a member of that partnership—its cashier—and was also the cashier of the succeeding corporation. There can be no reasonable conclusion from this testimony except that this paper was uncollectable and utterly worthless. Included also in the past due paper received from the partnership were two notes executed by the Tanana Electric Co., aggregating \$27,997.38. There is no question whatever about the worthlessness of these notes, and they alone are sufficient to practically exhaust the pretended undivided profits out of which the dividend was paid. The Tanana Electric Company of itself was of no financial worth and these notes depended for their sole worth upon an alleged guaranty of the Scandinavian-American Company, of Seattle, which guaranty the court found never had any existence. These notes were originally given to

the partnership bank and were long past due at the time they were taken over by the corporation.

The defendants, W o o d , McGinn and Jesson, against whom judgment for this dividend was rendered, were closely connected with the affairs of the corporation bank from its inception, and there can be no question but that they knew all about the utter worthlessness of the Tanana Electric notes.

Mr. Hill, who testified as a witness for the defendants respecting this matter, was also a member of the original partnership and an officer in the succeeding corporation. He was examined and cross-examined on the subject of these notes, and his cross-examination a p p e a r s at pages 807 to 826 of the record. This cross examination completely destroys the testimony given by Mr. Hill on direct examination and shows that the claim of a guaranty by the Scandinavian-American Bank never had any existence.

Counsel for appellants quote a portion of this testimony at pages 132 to 140 of their brief, but they very adroitly c l o s e the quotation at the question where the impeaching testimony of Mr. Hill is developed, and thereby omit the testimony which shows that, to say the least, he was mistaken in all his preceding statements in this matter. This omitted portion of the cross-examination clearly shows that the bank never at any time relied upon the pretended guaranty of the Scandinavian-American Bank, and to it the court is respectfully referred.

The other item of assets referred to in Mr. Stewart's testimony is capital stock of the Gold Bar Lumber Company, carried at \$341,949.00. While the court made no specific finding as to the actual worth of this property at the time the dividend was declared or at any particular time, he did find as to the same, generally, as follows (F., 40, R., 204.)

“ That at the time said investment was so made as aforesaid, said lumber company was closed down and immediately prior to closing down, it had been operated at a loss, that in so far as said lumber company was able to operate since the purchase of said stock by said corporation, all of its earnings and a part of its surplus have been expended in the purchase and repair of equipment for said mill, and in the operation of said mill its standing timber was being consumed and its best asset exhausted. That no dividends have ever been paid on the capital stock of said lumber company during the time the same was owned by said bank.”

Counsel state in their brief at page 126, speaking of the Gold Bar stock, that, “at the time of the trial Peterson valued the property at Three Hundred Thousand Dollars and stated that in 1908 and 1910 its value was greater.” Peterson did so testify on direct examination. His cross examination appears at pages 533 to 547 of the record, which is not referred to by counsel but which the lower court heard and considered. I wish to refer to a portion of it appearing at pages 545-46, from which it appears that Mr. Peterson's bank foreclosed its lien on this

stock which it held to secure an indebtedness due from the Fairbanks Banking Company. The sale under this foreclosure was completed but a short time before his deposition was taken, and it appears from the above testimony that his bank bid in the stock at this sale for a Hundred Thousand Dollars, a sum much less than the amount of his bank's lien, and that his bank still asserts a claim against the plaintiff's bank for any deficiency above a Hundred Thousand Dollars. I quote from his testimony (Rec., p. 546) :

“ Q. This property you say is worth \$300,000 at this time?

A. Yes, we believe it to be worth about that.

Q. Yet you only bid \$100,000 on it when you had a claim being foreclosed and reduced to a judgment in a sum in excess of \$100,000?

A. Yes.

Q. You feel, then, that you have received on that sale property worth \$300,000.

A. Yes, we believe that—that is an interest in the property worth that much.

Q. Well, you have got a four-fifths interest in the property (465), worth that much?

A. Yes, worth \$300,000.

Q. And therefore you have received property more in value than the amount of your judgment? A. Yes.

Q. Do you still assert a claim against the bank for the deficiency between your judgment and the \$100,000?

A. Yes, sir, we do.”

From the foregoing review of the testimony respecting the worth of the assets at the time the dividend was declared, it is respectfully submitted that the finding of the court—that at the time said dividend was declared and paid, the bank did not have any surplus or undivided profits out of which the same could be declared and paid—is supported by the testimony. The Tanana Electric notes alone were sufficient to practically exhaust the pretended profits, to say nothing of the other past due paper, Gold Bar Lumber Company stock and Washington-Alaska Bank stock.

(B) Was the dividend paid in violation of the laws of Nevada and in violation of the by-laws of the bank, and was such declaration and payment wrongful and illegal? The court, by its finding, 42, answered this question in the affirmative.

The by-laws of the bank on this matter appear at page 390 of the record and they provide, "Said dividends to be declared by the Board of Directors at the first regular meeting held subsequent to the 30th day of June and the 30th day of December of each year." This dividend was declared on April 12th. This was a clear violation of the by-laws and the court's finding was strictly in accord therewith. There is an effort to evade this situation by the contention that the dividend was declared *as of December 31st*. This matter will be dealt with later on.

As to the finding of the court that the dividend was declared in violation of the laws of Nevada, the court is respectfully referred to pages 391 and 392 of the record where such laws are copied. They plainly prohibit the payment of any dividend (except from the net profits arising from the business) and they further provide that the directors, under whose administration any violation of said section may have happened, shall, “in their individual and private capacities, be jointly and severally liable *to the corporation* and the creditors thereof to the full amount so \* \* \* paid out.”

It is respectfully submitted that finding 42 is in accord with the evidence.

We are now brought to a consideration of paragraphs 8, 9, 10, 11 and 12 of appellants' briefs, the substance of which is that the directors in declaring a dividend, acted in good faith and in the actual belief that the bank was solvent and possessed of a surplus and that their judgment in declaring the dividend is conclusive.

The evidence does not support these conclusions.

On April 13th, 1908 (Rec., pp. 448-449), the directors adopted a resolution requiring that a written report of the condition of the bank be presented at each monthly session and it was conceded at the trial that such monthly reports were made by the president. The minutes of the directors' meetings, copied in the record, show that this resolution was obeyed

and that when such report was presented, it was carefully considered by the directors and ordered filed. In this way the directors must have been constantly informed of the condition of the paper of the bank and the value at which the paper and the stock owned by the bank were carried. Three of the directors, against whom judgment for declaring this dividend was rendered, Messrs. Wood, Jesson and McGinn, were with the bank at its organization and must have known the worthlessness of its past due paper, particularly the Tanana Electric notes. Wood, according to his testimony heretofore referred to, must have known that the capital stock of the Washington-Alaska Bank of Washington was carried as an asset at a gross over-valuation of at least Seventy-five Thousand Dollars. Wood also knew the worthlessness of the Tanana Electric notes. Reference is made to his testimony in the record, pages 768 to 775, from which it appears that in August, 1912, the receiver herein was endeavoring to collect these notes on the Scandinavian-American Bank, the alleged guarantor, and brought suit thereon for that purpose. Wood was offered as a witness respecting this guaranty. He then testified that the advances to the Tanana Electric Company, for which these notes were given, were not made at the instigation of the Scandinavian-American Bank but were made at the instigation of the management of the directors of the Tanana Electric Company, and that there was never any reason for charging these amounts to the Scandinavian-Ameri-

can Bank, until instructions were received from it to do so. He further testified as follows (Rec., p. 773) :

“ Q. And the Scandinavian-American Bank did not authorize you in the usual course of business, or in any other manner, to advance these sums on their credit to the Tanana Electric Company, that you know of?

A. Not that I know of.

Q. As a matter of fact, you know that they did not?

A. I know that they refused to.”

To the same effect is the testimony of the defendants' witness, Volney Richmond (Rec., pp. 849 to 851).

The defendants herein have taken so many different positions regarding the circumstances attending the declaration of this dividend that it is impossible to reconcile them with each other or with their present claim of good faith. The dividend was declared on April 12th, 1910, and there is nothing in the resolution of the directors declaring it, appearing at record, page 384, to show but what it was intended to be declared on the condition of the bank on that day, and because of apparent surplus. At the trial it was first endeavored to create the impression that, although declared on April 12th, it was paid out on a subsequent date, between which time and the declaration of the dividend there had been an increase in the undivided profits of the bank sufficient or nearly sufficient to equalize the payments. See defend-

ants' cross examination of Sidney Stewart (Rec., pp. 434-435). In other words, that the dividend was declared in expectation of the collection of certain accrued interests which, when collected, would be sufficient to approximately meet the dividend. While it appears that there was an increase in the interest collections, as shown by the books, it subsequently developed that this increase was only apparent and arose through an application of this dividend to the interest accruing on stockholders' notes. In fact, at the Barnette trial, above referred to, Wood testified (Rec., p. 752), in substance, that one of the purposes of declaring the dividend was to reduce interest on stockholders' notes. Counsel, who represented the defendants at the trial of the case, went to great labor in showing that at certain dates subsequent to April 12th, a profit was shown by the books in excess of the dividend, by adding the interest accruing on stockholders' notes to the Twenty-five Thousand Dollars received as a dividend on the Washington-Alaska Bank of Washington.

It was next contended that while the dividend was declared on April 12th, it was declared on the condition of the bank *as of December 31st, 1909*. At times this was claimed by both Wood and McGinn, while testifying as witnesses for the defendants, but this claim is unreasonable. It required the Twenty-five-Thousand-Dollar dividend on the stock of the Washington-Alaska Bank of Washington to make an apparent surplus sufficient to pay a dividend by the

Fairbanks Banking Company, but the dividend of the Washington-Alaska Bank was not declared until April 12th, 1910. How then could it have been used in computing the profits of the Fairbanks Banking Company on December 31st, 1909?

Unfortunately for Wood, however, he was examined on said Barnette trial respecting the affairs of the bank on December 31st, 1909, and on that trial he was (Rec., pp. 741-44) inquired of concerning the bad paper of the bank on December 31st, 1909, and testified that there was charged off practically Twenty-six Thousand Dollars at that time and further said, "December 31st, 1909, I think we charged off all the bank could stand at that time, *the earnings of the bank itself* or most all of it."

The foregoing establishes the want of good faith on the part of the directors in declaring a dividend. It shows conclusively that there was no good faith, especially as to Wood and McGinn, defendants, against whom judgment for this item was entered.

Counsel quote, at page 146 of their brief, as proving that the directors actually possessed a surplus on April 12th, 1910, the testimony of John A. Clark, one of the defendants herein. That testimony is utterly worthless, because Clark was not a director when the dividend was declared and was not elected until a month thereafter (Rec., p. 892). Testimony quoted by counsel further shows its worthlessness because it appears therefrom that it relates to the condition of the bank on *October* 12th, 1910.

The fact that McGinn carried a large deposit in the bank proves nothing as to his actual belief as to the condition of the bank. He may have felt that because of his close connection with the managers of the bank, he would be protected. At any rate, it appears in the record that very shortly after the dividend was declared and paid, Wood and McGinn severed their connection with the Fairbanks Banking Company, by purchasing from it the entire capital stock of the First National Bank. McGinn seems to have wasted no time in withdrawing his deposit by applying it to the purchase of half of this stock.

Counsel for appellants rest their position as to this subject on the law applicable to transactions of a like character done in good faith. The facts fail them as to their good faith. They must, under their own citations of authority, be held liable for declaring this dividend. Furthermore, the dividend was declared in violation of the positive terms of their own by-laws and of the banking laws of Nevada.

In my briefs heretofore filed herein, in companion cases arising out of the same state of facts and pending in this court, namely, *Noyes v. Wood*, Nos. 2593 and 2594, the liability of the directors for fraudulent, negligent, unlawful and illegal acts, is fully briefed and discussed, to which reference is now respectfully made as to the law applicable to the matter under consideration.

That the defendants are liable for declaring and paying the dividend under the evidence and the facts found by the court, see:

*Appelton v. Elec. Veh. Co.*, (N. J.) 65 Atl. 910;

*Coleman v. Booth*, (Mo.) 186 S. W. 1021;

*E. L. Moore Co. v. Murchison*, 141 C. C. A. 435, 437;

*Briggs v. Spaulding*, 141 U. S. 132, 35 L. ed. 662;

*Cottrell v. Mfg. Co.*, 126 N. Y. S. 1070;

*Cooper v. Hill*, 36 C. C. A. 402;

*Cockrill v. Cooper*, 29 C. C. A. 529.

It is respectfully submitted that the judgment of the lower court against the defendants, Wood, McGinn, Brumbaugh and Jesson, jointly and severally, for \$33,720.00 on account of the declaration and payment of the dividend of April 12th, 1910, should be affirmed.

#### IV.

The defendants, Jesson, Hill, Peoples, Brumbaugh and McGinn, are liable jointly and severally for the purchase of shares of capital stock of the Fairbanks Banking Company, made during their respective terms of office, as found by the decree.

The findings of the court on these matters are contained in findings 29, 30, 31, 32, 33, 34, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 54, and the conclu-

sions of law drawn by the court, on which the judgment herein complained of was entered, are numbers 2, 3, 4, 5, 6, 7 and 8. (Rec., pp. 200, 202, 205, 211, 216 and 217.)

As to the surrender of stock issued to Strandberg Brothers and Johnson and to the defendants, R. C. Wood and John L. McGinn, covered by findings 29 to 34, and 45, 48 and 49, the court refused to enter judgments therefor. They do not concern the matters involved in this appeal further than the bearing they have upon the general policy of the bank to accept surrenders of its stock.

Generally as to all of these surrenders, the court made the following findings (F. 51, 52, 54; Rec., pp. 209-211) :

LI.

“ That when stock was so taken back by the corporation, the amount paid therefor was either paid in cash, or notes held by the bank were cancelled and surrendered to the stockholders.

“ That said bank had no surplus or undivided profits against which the same could be charged.”

LII.

“ That the taking back of said stock and the payment therefor as aforesaid was illegal, wrongful, and in violation of the laws of the State of Nevada under which said corporation was organized.”

LIV.

“ That said stock surrenders so made as aforesaid were acquiesced in by said directors, and in some instances were made under their directions and with their express approval.”

As to the stock of Wood, McGinn and Strandberg Bros. and Johnson, for the surrender of which the court declined to enter judgment against the officers and directors, the receiver herein has taken an appeal which is pending in this court, entitled, *Noyes v. Wood et al.*, No. 2593, in which the law applicable to said surrenders is fully discussed and the authorities reviewed. To that brief (pages 76 to 105) reference is now respectfully made, inasmuch as it relates to transactions similar to the ones in this case and is directed to the same findings of fact.

The general right of a corporation to purchase its own stock has been frequently before the courts and they are divided upon this question. The courts of England have established and rigidly adhere to the rule that a corporation cannot become a purchaser of its own shares. In the United States, where such right has been allowed, it is generally derived from statute; or in the absence of a statute positively prohibiting it, the defendant corporation was acting within some recognized exception to the rule prohibiting it, as where, for instance, it was not prejudicial to the rights of creditors or stockholders or where the purchase was not made out of the capital but out of the surplus and undivided profits. The cases cited

by counsel for appellants in the instant case do not contravene this rule. The substance of counsel's contention is that if the directors acted in good faith and without injury to the creditors, there is no liability. Although some decisions declare this to be the rule, the further proviso is most frequently added that the purchase shall be made out of the surplus and not out of the capital.

The Nevada law prohibited the trustees from dividing, withdrawing or in any way paying to the stockholders any part of the capital stock. It also prohibited a reduction of the capital stock unless done in the manner prescribed in the act. It will thus be noted that two of the common methods resorted to to deplete the capital stock are condemned and prohibited. Counsel in their brief at page 88 laid great emphasis on their contention that the purchase of stock complained of did not reduce the capital; but the statute also prohibits a division, withdrawal or payment of any of the capital to the stockholders. The complainant herein does not charge a reduction of capital but charges that shortly after commencing business, the bank began to reduce the *issued* capital by accepting surrenders thereof (Par. 19, Rec., pp. 19-22). There was no intention to charge an unlawful *reduction of the capital stock* denounced by the act. The capital stock of the company always remained, as provided in its articles, at Three Hundred Thousand Dollars. The outstanding or issued capital stock, however, was reduced by accepting sur-

renders thereof to the bank and these are the acts complained of. Counsel's position is a little inconsistent with itself on this matter, however, because while contending at from pages 88 to 95 that the buying of the shares of its own capital did not reduce the capital stock, they contend at page 150 that creditors whose debts were contracted subsequent to the reduction, can only look to the capital as reduced.

While defendants claim that there was no intention to reduce the capital stock by accepting these surrenders, nevertheless they really treat the matter as though the capital stock had been reduced. The stock purchased was no longer considered as a liability of the bank and when the directors declared a dividend, it was only distributed among the holders of outstanding stock; no portion of this dividend was set aside as belonging to the stock which had been surrendered to the bank.

Counsel claim that the purchase of this stock was without the knowledge and against the instruction of the directors. There was a conflict in the testimony on this matter and the lower court, after hearing all of the testimony, resolved this point against the defendants (F. 44, Rec., p. 211), and by this finding we are bound on appeal.

There was abundant testimony to support the finding. At every monthly meeting of the directors, a statement showing the financial condition of the bank was laid before them and considered by them.

This statement alone would constantly keep the directors advised to the effect that the outstanding capital stock was being reduced. In numerous instances shown by the testimony, the directors expressly authorized the surrender and purchase of the stock. At other times actions of the executive committee, authorizing the acceptance of stock by the bank were formally approved by the directors.

On July 13th, 1908, immediately following the surrender of Wood's stock, that being the first surrender, the directors expressly resolved that, "It was the sense of the meeting that any stockholder desiring to give up his stock be paid for same and the stock returned to the treasurer of the bank." (Rec., p. 457.) This resolution declared the initial policy of the bank.

Between June 30th, 1908, and October 25th, 1910, thirty-nine distinct surrenders of stock, occurred in an amount aggregating a total of Fifty-six Thousand Dollars. This would certainly justify the court's finding that such surrenders were frequent and continuous. (F. 44, R. 206.) They were in fact a carrying out of the declared policy above referred to. The matter came before the board expressly in a number of instances and by them, surrenders were expressly authorized. In a few instances they declined to accept a surrender, but the very fact that the matter was so frequently before the board would, of itself, bring to their attention the knowledge that the stock was being surrendered.

Mixed up with the occasions on which the directors were authorizing these purchases, they did on two occasions resolve not to buy any other stock, namely, on April 12th, 1909, and October 14th, 1908. (Rec., pp. 863 to 866.)

As to the first of these resolutions (864) it appears that one, Thrash, wanted to dispose of his stock to the bank. The executive committee acted on the matter on February 3rd, 1909, and authorized that answer be made that the bank "did not desire to buy any stock *at the present time.*" The minutes of this meeting were approved generally by the directors on the following April 12th. But on the following June 10th, Hart and McConnell were permitted to surrender their stock in the sum of a Thousand Dollars. A complete list of the dates on which stock surrenders were accepted by the bank and the total amount of stock accepted on each day appears at page 355 of the record, except that there should be added thereto the surrender on October 25th, 1910, of the John L. McGinn stock, amounting to Ten Thousand Dollars. This list shows the total amount surrendered on each of the dates therein named but does not show the names of the individuals whose stocks were surrendered. Immediately following this list of stock surrenders appears the testimony of Sidney Stewart (pages 358 to 372, 472) showing the condition of the bank on said dates. From this testimony it appears that on every date from June 30th, 1908, to and including June 10th, 1909, during which time \$41,-

500.00 of stock was surrendered back to the bank, the liabilities of the bank exceeded its assets as shown by the books of the bank, except on January 12th, 1909, when the books showed an excess of assets amounting to \$200.00. As to the action of October 14th, 1908, above referred to, it appears that on Sept. 14th, 1908, the executive committee, having before it the application of Hans Stark for the surrender of his stock, expressed the sense of the meeting to be that, "It was not policy *at this time to continue* taking over stockholders' interests."

On September 12th, 1908, two days previous to the above meeting of the executive committee, the directors expressed the sense of the meeting to be "that the bank take back the stock of Mr. Hans Stark and pay him therefor par value." At said meeting of the board of directors on October 14th, 1908, the minutes of the executive committee and the minutes of the meeting of the board of directors above referred to were each approved. This of itself makes a farce out of the whimsical resolutions of the directors and executive committee and leaves the usual course of business dealing of the bank in accepting these surrenders to stand as the best expression of their policy in that regard.

Counsel contend in their brief that the Nevada law was not violated because it does not forbid the *reduction* of the capital stock but provides a method by which it may be done. As above stated, that portion of the Nevada law just referred to has nothing

to do with this case, because it applies to a reduction of the capital stock and not to a withdrawal, division or payment of a part thereof to the stockholders. Furthermore, while the Nevada law does provide a method by which the capital stock may be reduced, the testimony is positive that none of the things required by said laws in reducing the capital stock were done or attempted to be done in the matter of these stock surrenders.

While the articles of incorporation did authorize the Fairbanks Banking Company to buy and sell stocks, they did not authorize it to deal in its own stock. A provision of the articles of incorporation authorizing the dealing in stocks does not include dealing in the corporation's own stock. (*Maryland Trust Company v. Bank*, (Md.) 63 Atl. 70.) Furthermore, if such articles did authorize the purchase of its stock for the bank, the same would be void, because in conflict with the statute of Nevada under which the bank was incorporated. *Cooper v. Hill*, 36 C. C. A. 402-407.

It is respectfully submitted that the judgment of the lower courts against the defendants herein for the stock surrenders occurring during their respective terms should be affirmed.

## V.

**Plaintiff is not limited to a recovery for the benefit only of creditors existing at the times of the acts complained of and whose claims remain unpaid. He may recover to such extent as the bank has been injured.**

I have not had time or opportunity to examine all of the cases cited by counsel on this subject. They seem to rely, however, most especially upon *McDonald v. Dewey*, 202 U. S. 510. The facts in that case and the point under consideration by the court are entirely distinct from the case at bar. In the *McDonald* case the receiver was suing to enforce the added stockholders' statutory liability. This is a liability created solely for the benefit of creditors. In other words, it was a distinct right of the creditors which was being enforced and of course it would not be right to enforce this liability against a stockholder who was not such stockholder when the particular creditor dealt with the corporation. But in the case at bar, the receiver is enforcing a right of the bank against its faithless officers and seeking to recover for the injury to the bank. This claim against the officers, as has been heretofore pointed out, is an asset in the hands of the receiver; but it is none the less a claim of the bank and not a claim of the creditors, which is being enforced. With this view of the matter, it can make no difference when the creditors now existing became creditors.

If the other cases cited by counsel support the principles expressed by them in their brief, then they too seem to be cases in which the specific rights of creditors were being enforced. They relate to the setting aside of fraudulent conveyance by the debtor. Of course, a conveyance by a debtor in fraud of his creditors would give rise to a claim in favor of the creditors existing at the time but that has nothing to do with a case where the receiver is enforcing a claim existing in favor of the insolvent corporation itself, as is the case at bar. That it need not be shown that the creditors were such at the time the alleged wrongs were committed, see the following cases: *Coleman v. Tepel*, 144 C. C. A. 361-369; *Hamon v. Taylor Rice Engineering Company*, 84 Fed. 393; *North v. Union S. & L. Association*, (Ore.) 117 Pac. 822-825; *Coleman v. Booth*, (Mo.) 186 S. W. 1021. Cook on Corporations, 6th ed., section 548:

“ Hence the rule has been firmly established that, where dividends are paid in whole or in part out of the capital stock, corporate creditors, being such when dividend was declared, *or becoming such at any subsequent time*, may, to the extent of their claims, if such claims are not otherwise paid, compel the stockholders to whom the dividend has been paid to refund whatever portion of the dividend was taken out of the capital stock.”

—Cook on Corporations, *supra*.

## VI.

**The Barnette trust deeds were not an accord and satisfaction of plaintiff's claims against these defendants, either in whole or *pro tanto*.**

The substance of the answers filed by the various defendants pleading these trust deeds is, that they were executed in full satisfaction of all the wrongs complained of in the complaint; that the promises therein made by Barnette were made on the *distinct understanding and agreement* that no litigation would be instituted against him or others for or on account of the matters and things set up in the complaint; that for this purpose and to prevent any litigation, and as security for the faithful performance of said promises, and with the knowledge, consent and approval of the court, the trust deeds were executed; that the receivers agreed to accept the property therein conveyed in full satisfaction of all matters and things set forth in the complaint, and that Barnette and his wife made and executed said promises and conveyed said property in full satisfaction of all suits or causes of action then existing against him on account of any and all matters and things arising from his connection with the bank and in full satisfaction of all the matters and things set forth in the complaint, and that the receivers accepted and received said promises and property in full satisfaction of all claims and causes of action set up in the complaint; that the amounts of money and property

already received by the receivers from the estate of Barnette are more than ample to pay all the matters and things charged against these defendants, Wood, Healy and McGinn, and they allege that all the wrongs and things charged against them in the complaint have been fully satisfied and paid.

The remaining defendants plead as to this matter that when Barnette returned from Fairbanks, he voluntarily submitted to the then receivers, a proposition wherein he acknowledged that he was liable for any irregularities that might have occurred in the management of the bank and for any loss sustained by reason of any of the acts and things that are in the complaint alleged to have been performed and done by the directors and officers of the bank; that in the trust deeds he acknowledged his liability for the payment of the amounts due to the depositors and holders of unpaid drafts as well as any other indebtedness of the bank by which he might be liable by reason of any mismanagement on his part; that said deeds were delivered for the express purpose of securing the payment, not only of the depositors and holders of unpaid drafts, but also any other indebtedness of any nature or description owed by the bank at the time of its suspension; that at the time said proposition was made by Barnette and his wife, the attorneys for the receivers had prepared a complaint against Barnette and some of the other directors, charging Barnette and said other directors with most, if not all, the alleged wrongful acts contained in the

complaint; and that it was understood by the receivers, by their attorney and by said Barnette that the execution of said deeds and the delivery thereof and their acceptance by the receivers was to be in full settlement of all claims of every nature and description that might exist against Barnette and the other directors by reason of or because of any of the acts and things done and performed by said directors; and that said deeds were accepted as a full release and discharge of all liability of said Barnette and his co-directors for any and all alleged wrongful acts and things done or performed in connection with said bank; that the deeds were accepted in full accord and satisfaction of all liability of Barnette, as president and director, and of his co-defendants, during the several periods of their incumbency; and that by reason of the payment in full of all claims with which these answering defendants could be charged, as set forth in the complaint, these defendants are discharged from any and all liability and any and all damage occasioned to said bank by reason of the alleged wrongful acts and things.

There was not the slightest attempt made to prove the allegations that a complaint had been prepared against Barnette and some of the other directors, charging them with all or any of the acts complained of in the complaint herein, nor was there any attempt to prove the alleged understanding between Barnette, the receivers and their attorney that the execution and delivery of these deeds was accepted

in full settlement of all claims against Barnette and the other directors or in any particular as settlement of such claims.

The defendants, having asserted these trust deeds as a defense, it was incumbent upon them to prove that they were executed, delivered and accepted for the purposes and under the circumstances claimed by them. There isn't a particle of testimony to show that Barnette was settling any claim against any person other than himself, nor is there any testimony to show the character and amount of the liability on his part, referred to in the trust deeds. It is purely a conjecture on the part of plaintiffs that it was a tort liability. There is nothing to refer it to the torts sued on, nor is there anything in the trust deeds to show that Barnette considered himself subject to a claim for tort committed either by himself or in connection with these defendants. So far as the deeds and the proceedings had respecting them disclosed, it was just as apparently a contract liability, or pure moral obligation, that Barnette had in mind. It is not necessary for the court to find what particular motive prompted Barnette to execute these deeds; the only question is, was he acting in the settlement of a joint tort liability between himself and these defendants? Nowhere in the proceedings does he concede that a liability exists against him for fraud arising out of his management of the affairs of the bank. It can just as reasonably be inferred from the instruments themselves, and that is the only evi-

dence on the subject, that Barnette, realizing that he had been an active and responsible party in the management of the affairs of the bank and that by reason of the same not being conducted successfully, loss had resulted to those who relied upon his business judgment and integrity, which loss, as a purely moral obligation, he now wished to repair. If such was the case, then, clearly, he was not settling any claim for tort against these defendants for their fraudulent acts.

Nor is the evidence of such compelling force as to lead to the conclusion that the receivers or their attorneys or the court understood the trust deeds in the sense contended for by counsel. It is remarkable that counsel should not introduce some testimony to prove so important an alleged understanding. Depositions were taken by the defendants on many of the matters involved in their answers and they even took depositions and introduced testimony respecting the character and value of the property referred to in the trust deeds but they never attempted to take the testimony of the receivers who accepted the trust deeds or of their attorneys or of Barnette and his wife who gave it, nor of the court, under whose directions they were accepted, for the purposes of proving their allegation as to the alleged understanding between these parties in the acceptance of the deeds. Failure to offer such testimony or some excuse for not doing it, compels the conclusion that had these witnesses been offered, their testimony would have been adverse to the contention of counsel.

It may have been in the minds of the receivers that there was danger in the future of such contention being made and hence the reason for petitioning the court, asking his advice in the matter and suggesting to him that the acceptance of these deeds might make impracticable a suit against Barnette. But inasmuch as the court directed them to accept the deeds, and evinces no intention whatever to discharge anyone from tort liability, it must follow that the court did not regard the acceptance of these deeds as in any way affecting any tort liability which might subsequently be asserted.

Again, the deeds show on their face that they are executed solely for the benefit of "depositors and the holders of unpaid drafts." If Barnette was settling a tort liability, why should he settle it only as to depositors and holders of unpaid drafts? Would he not include in such settlement, the stockholders and all creditors of the bank of every character whatsoever? Counsel concede in their answer that the Dexter-Horton National Bank had a claim against the Fairbanks Banking Company in excess of \$120,000.00. Would not Barnette have been interested in settling his liability on that claim? Stockholders have suffered a loss to the extent of many thousands of dollars by the failure of this bank, yet they are not referred to or benefited in any way by the trust deeds.

As a matter further indicating the intention of the parties not to be as contended by counsel, the attention of the court is invited to the fact that the

property referred to in the trust deeds is conveyed in trust for specific purposes and cannot be used for those purposes until all the assets of the bank have been exhausted. Barnette only agrees to become liable for “any deficit that may hereafter be ascertained as between the amounts due to such depositors and owners of unpaid drafts \* \* \* and the amount realized out of the *property and assets of the bank* and paid to such creditors.” The claims of the bank against its faithless officers for the injury resulting to it out of their misconduct complained of, is an asset in the hands of the receiver, and under the express provision of the trust deeds above quoted, that asset must be collected in before any of the trust property can be used.

According to the decisions relied upon by counsel, there is nothing in evidence to show that the trust deeds were accepted in satisfaction of any claim against Barnette. Under those authorities, such satisfaction “*should be evidenced by some express agreement to that effect, or by some unequivocal act evidencing such purpose.*”

The mere possibility of acceptance for such purpose will not do; even the probability will not sustain the defense pleaded. Counsel have not pointed out any “express agreement to that effect” nor “any unequivocal act evidencing such purpose.”

Why should the acceptance of these trust deeds redound to the sole benefit of these defendants, as

claimed? Why should the money in the hands of the receiver, arising out of the rents and profits of the Alaska property, be applied to the payment of judgment herein appealed from? What is there in the trust deeds that unequivocally evidences such a purpose? These judgments appealed from aggregate \$54,720.00. The receiver herein has appealed from the refusal of the lower court to grant him additional judgments aggregating approximately \$154,000.00, growing out of the m i s m a n a g e m e n t of these defendants of the affairs of said bank, and which appeals are now pending in this court, entitled *Noyes v. Wood*, numbers 2593, 2594. Why should the \$50,000.00, claimed to be in the hands of the receiver as such rents and profits, be applied in one series of claims and for the benefit of these particular defendants to the exclusion of those affected by the claims involved in the appeals referred to? There is no such unequivocal intention evidenced by the trust deeds.

In so far as the trust deeds were covenants not to sue, they were covenants not to sue *before November 18, 1914*. Not to sue for what? On what cause of action against Barnette? Most likely, on the one arising out of the particular character of the obligation or liability in the mind of the parties at the time. The trust deeds speak of Barnette's obligation to depositors and owners of unpaid drafts, and refer to the Receivers being about to bring an action based on the liability of Barnette to said creditors arising out of

his management of the affairs of the bank. What kind of an "obligation," what kind of a "liability," was in contemplation of the parties? Was it in tort or in contract? If in tort, was it single or joint? If joint, was it in connection with these defendants? There is absolutely nothing in the record from which an answer to these questions can be made. If the construction of defendants prevails, it is a forced one; one that does not naturally and plainly arise out of the instruments. One that compels a concession on the part of Barnette, when he plainly refrained from making, namely, that he had been guilty of wrong doing which resulted in injury to the depositors and holders of unpaid drafts. If such had been his purpose, or what was in the minds of the parties, how easy it would have been to say so. Barnette would have wanted it clearly expressed for his own protection, because so long as his tort liability is open to be asserted against him, he would be in danger of suit to enforce it.

Whether there was a consideration for the trust deeds does not concern the Receiver in this action. That is for these defendants to prove. If the trust deeds should fail as a defense unless some consideration is imported to them, is no argument for implying a consideration. The so-called promise of Barnette, if a promise at all in respect to the injuries complained of, was no consideration. By it, he simply agreed to do that which he was already bound to do. Its language shows that it was not made in settle-

ment of the injuries herein complained of. It relates solely to "*any deficit that may hereafter be ascertained as between the amounts due to such depositors and owners of unpaid drafts \* \* \* and the amount realized out of the property and assets of the said bank.*" If the contention of defendants shall prevail, then the only sum due for injuries is the amount of the judgments herein or \$54,720.00; but the deficit Barnette obligates himself to pay exceeds that amount by over \$425,000.00. Would anyone contend that, upon payment of these judgments for \$54,720.00, the Barnette trust deeds were discharged? Such must be the result if the deficit referred to therein is measured by or relates to the injury suffered through misconduct of the bank's officers.

There never was a covenant not to sue Barnette. At the very most, the acceptance of the trust deeds operated as a covenant not to sue him *before November 18, 1914*. When that date passed, Barnette was and is subject to suit. The argument of counsel on this point is predicated upon the assumption that there was a perpetual covenant not to sue Barnette, which assumption has no foundation in fact. The very fact that the trust deeds operated to stay the right to sue only for a brief time is the strongest kind of basis for the presumption that there was no intention to release Barnette from liability on the matters in the minds of the parties at the time the trust deeds were accepted, and that there was no satisfaction of the claims of the Receivers against him, whatever

may have been their nature or character as asserted by them. Hence the Receivers did not accept the promise of Barnette as a satisfaction of their claims, as contended by counsel, but only as the price paid by him for his peace until November 18, 1914. When that date came and Barnette's promise was unfulfilled, the bar lifted and he became subject to suit.

The nub of this whole controversy lies in the fact that the Receiver is not permitted under the terms of these trust deeds, to apply the property conveyed to the satisfaction of the claims of depositors and holders of unpaid drafts prior to November 18, 1914, and then only upon the deficit existing between the amount of such claims and the amount realized out of the property and assets of said bank. How could such a conveyance operate as a release or satisfaction of the claims of the bank against these defendants which claims are a part of the very assets that must be first collected and applied to determine the deficit remaining and for which the trust property is liable? How could there be a satisfaction in full or *pro tanto* when the property received can not be enjoyed by the acceptor? I concede that there can be but one satisfaction for the wrong done; but in this case the property contended to have been received in satisfaction becomes available only when, and not until, all the assets of the bank have been exhausted, and these claims now being prosecuted are a part of those assets.

There is a further reason why the trust deeds cannot be given the effect contended for by appellees. They are not absolute conveyances in settlement of liability; but are purely conditional and the rights of the Receiver therein might be defeated by contingencies. It was only in the event that the claims of depositors and holders of unpaid drafts should not be satisfied, either out of the property and assets of the bank, *or otherwise*, or have been paid and satisfied by Barnette, by the 18th day of November, 1914, that the trust property could be resorted to, and then only such part thereof as may be needed to extinguish said deficit, the surplus being returned to Barnette. By reason of this condition, a situation might arise whereby the entire property should be returned to him. It only became the property of the receivers on condition that some one else, or some other property, did not satisfy said claims. Such an agreement is neither a release nor satisfaction *pro tanto*.

In *Musolf v. Electric Co.*, (Minn.) 122 N. W. 499, suit was brought for injuries resulting in the death of deceased. While in the employ of a telephone company, he was killed through contact with a heavily charged wire of defendant. For death by wrongful act, the statute limited recovery to \$5000.00. Plaintiff recovered a judgment against defendant for the full amount of \$5000.00, which was affirmed. Defendant plead an agreement previously entered into between plaintiff and the telephone company by which plaintiff covenanted not to sue the

telephone company in consideration of the payment to her of \$1000.00 by it. This release contained a clause that in case, in an action against the present defendant, the court should hold that no cause of action existed against such defendant, then plaintiff might remit the \$1000.00 to the telephone company and thereafter commence an action against it. The court said:

“ In the case at bar the statute limited the amount of recovery to \$5000.00. The agreement as has been pointed out, was not a release at all, but an optional covenant not to sue. The agreement was not in the nature of a receipt, of an accord and satisfaction, or of a settlement of a claim, in whole or in part. It excluded the idea of satisfaction, either partial or entire. It was expressly conditional.”

It is respectfully submitted that there was no acceptance of the trust deeds as satisfaction in whole, or *pro tanto*, of the bank's claims against the defendants herein sued on, and that the decree of the lower court rendering judgment against the defendants for declaring and paying the dividend and accepting stock surrenders should be affirmed.

Respectfully submitted,

O. L. RIDER,  
*Attorney for Appellee.*

